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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1963

No. [redacted] 1963

IN THE MATTER OF THE APPLICATION

of

ABE FURMAN,

Petitioner-Appellant,

—against—

THE CITY OF NEW YORK, by Peter Campbell Brown, Corporation Counsel and ANDREW M. PINCKNEY, HARRY BORDEN and JAMES R. GEREGHTY, as Commissioners of Appraisal of Neversink Consolidated Riparian Sections Nos. 1 and 2,

Respondents-Appellees.

For an Order Pursuant to Article 78 of the Civil Practice Act

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS APPEAL

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1423

IN THE MATTER OF THE APPLICATION

of

ABE FURMAN,

Petitioner-Appellant,

—against—

THE CITY OF NEW YORK, by Peter Campbell Brown, Corporation Counsel and ANDREW M. PINCKNEY, HARRY BORDEN and JAMES R. GEREGHTY, as Commissioners of Appraisal of Neversink Consolidated Riparian Sections Nos. 1 and 2,

Respondents-Appellees,

For an Order Pursuant to Article 78 of the Civil Practice Act

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MOTION TO DISMISS APPEAL

The appellees move pursuant to Rule 16 of the Rules of the Supreme Court of the United States to dismiss the appeal on the ground that the decision appealed from was based on a non-federal ground and did not involve a determination of the validity of the statute.

Counter-Statement of Question Presented

Was the decision sought to be reviewed based on an adequate, independent non-federal ground?

Statement of the Case

This proceeding was brought under the provisions of Article 78 of the Civil Practice Act of the State of New York for an order requiring commissioners of appraisal in a condemnation proceeding to hear and determine the appellant's claim for damages to his property allegedly resulting from the diversion of water from the Neversink River by appellee.

The application brought on pursuant to this proceeding was denied by the New York Supreme Court on the grounds that the appellant had previously unsuccessfully sought identical relief in the condemnation proceeding, and that the order in the condemnation proceeding constituted the law of the case (Davis, Statement, Exh. A, pp. 17-19).

Appellant appealed to the Appellate Division from the order entered on such application. By decision dated September 25, 1961, that court dismissed the appeal unless the appellant filed and served the record, brief and note of issue on or before December 1, 1961, and was ready for argument at the January 1962 Term of that court. The decision of the Appellate Division is officially reported in 13 A D 2d 712 (3d) and its text is set forth in the appendix of the Jurisdictional Statement, Exh. B, p. 20. The record, brief and note of issue were never served or filed, and the appeal was never argued.

Six years later appellant made a motion in the Appellate Division to reinstate the appeal which was denied

by an unreported decision of that court, dated October 22, 1968, the text of which is set forth in the appendix of the Jurisdictional Statement. Exh. C, p. 21.

Appellant then appealed to the New York Court of Appeals from the order entered on such motion, but, on motion of appellee, such appeal was dismissed upon the grounds that the order appealed from did not finally determine the proceeding within the meaning of the New York Constitution. The memorandum opinion of the New York Court of Appeals is officially reported at 23 N Y 2d 1041 and the text is set forth in the appendix of the Jurisdictional Statement, Exh. D, p. 22. The order entered on that opinion is the order which the appellant now seeks to review.

Facts

As indicated previously, this Article 78 proceeding arose out of an earlier condemnation proceeding commenced by the Board of Water Supply of the City of New York on behalf of the City of New York, the appellee herein, under Title K, Chapter 41 (now Chapter 51) of the Administrative Code of the City of New York (L. 1929, ch. 929), known as the Water Supply Act, to acquire the right to divert water from the Neversink River.

The oaths of office of the commissioners of appraisal in the New York condemnation proceeding were filed in the Sullivan County Clerk's office on May 29, 1952, and in the New York County Clerk's office on June 2, 1952. The City thereupon became vested with the right to divert water, as specified in the petition and the order appointing commissioners of appraisal pursuant to the Administrative Code of the City of New York (§K41-11.0). Actual diversion commenced June 1, 1953.

No claim on behalf of appellant for damages to his property allegedly resulting from the diversion was served or presented to commissioners within three years of the filing of the oaths of office of the commissioners as prescribed by the statute. The explanation of the attorney for the appellant for the failure to file a claim was that on February 23, 1955, he forwarded a proposed claim to appellant for his signature; that appellant misplaced the claim; and that the attorney overlooked the fact the claim had not been signed, returned and filed.

At a hearing before commissioners of appraisal, on October 4, 1956, more than four years and four months after the City acquired the right to divert and more than three years and four months after the actual diversion commenced, appellant sought to prove damages to his property.

Accordingly, the City, at the hearing of October 4, 1956, interposed the defense of the statute of limitations on the ground that no claim had been filed or presented within three years of the taking as required by the Administrative Code of the City of New York §K41-18.0 (now §K51-18.0). The commissioners of appraisal thereupon halted the trial to afford the parties an opportunity to obtain an adjudication as to the effect of the failure of appellant to file a timely claim (Juris. Statement, Exh. A, p. 18).

After the refusal of the commissioners of appraisal to hear the claim, appellant moved, in the condemnation proceeding, for an order directing the commissioners to hear the claim and to determine the compensation to be made on the ground that allegedly certain communications between appellant's attorney and the New York City Law Department were the equivalent of a claim and that appellee had, in effect, waived the filing of a claim.

Such motion was denied by the New York Supreme Court on the ground that the claim was barred by the statute of limitations and on the further ground that the kind of relief sought must be applied for under Article 78 of the New York Civil Practice Act (Juris. Statement, Exh. E, pp. 23-24). An order was entered on April 15, 1957, and served on the attorneys for appellant by mail on April 18, 1957. There was no appeal taken from such order.

After the time to appeal from that order of the New York Supreme Court had elapsed, the present Article 78 proceeding was commenced on behalf of appellant, by order to show cause and affidavit dated August 9, 1957, seeking the same relief as had been unsuccessfully sought on the previous motion in the condemnation proceeding. The issues were the same on the second application as on the first except that on the second application it was contended in addition that (1) the provisions of the Water Supply Act were unconstitutional and (2) that appellee failed to comply with the Water Supply Act in certain respects. Those questions could have been but were not raised on the previous motion in the condemnation proceeding.

The application in this Article 78 proceeding was denied by the New York Supreme Court in an unreported memorandum dated July 22, 1958, on the ground that no appeal had been taken from the previous order in the condemnation proceeding and that such order stood as the law of the case (Juris. Statement, Exh. A, pp. 17-19).

The order on such decision was entered on July 25, 1958. A notice of appeal from such order, dated July 30, 1958, was served on August 1, 1958. However, appellant did not prosecute that appeal in this Article 78 proceed-

ing. Consequently, a motion was made to dismiss that appeal. This resulted in an order of the Appellate Division, dated September 6, 1961, and entered on September 25, 1961, which granted the motion to dismiss unless appellant filed and served the record, his briefs, and the note of issue on or before December 1, 1961, and was ready for argument at the January 1962 term of the Appellate Division, in which event the motion was denied [14 A D 2d 712(3), Juris. Statement, Exh. B, p. 20]. The record, brief and note of issue were never served.

On December 22, 1958, appellant made a motion in the condemnation proceeding for reargument of the previous motion which he had made in that proceeding. Such motion was granted solely on the predicate of *Schroeder* v. *New York,* 371 U. S. 208 (1962). (Juris. Statement, Exh. F, pp. 25-26). However, the New York Appellate Division reversed on the ground that *Schroeder* was clearly distinguishable (22 A D 2d 984, 254 N. Y. S. 2d 748, Juris. Statement Exh. G, pp. 27-28). The New York Court of Appeals affirmed on the ground that the earlier determination in the condemnation proceeding was a final order which settled the rights of the parties (20 N Y 2d 568, 232 N. E. 2d 642, Juris. Statement, Exh. H, pp. 29-33). A motion for reargument was denied (21 N Y 2d 880, Juris. Statement, Exh. I, pp. 34-35) and subsequently a motion to amend the remittitur to show that a constitutional question was presented and passed upon was granted (21 N Y 2d 1036, 238 N. E. 2d 503, Juris. Statement, Exh. J, pp. 36-37).

A notice of appeal to this court was served and filed on behalf of appellant on July 12, 1968. This was more than seven months after the decision of the New York Court of Appeals on November 29, 1967, and more than

four months after entry of the order denying reargument of the appeal on March 4, 1968. It was within 90 days of the amendment of the remittitur. A jurisdictional statement was received by appellees on July 26, 1968. However, the appeal, in the condemnation proceeding, to this court was withdrawn on or about July 30, 1968.

Thereafter appellant moved before the New York Appellate Division, in this Article 78 proceeding, for that court to reinstate the appeal which it had previously dismissed in 1961. Such motion was denied (Juris. Statement, Exh. C, p. 21). Appellant then appealed from the order entered on that denial to the New York Court of Appeals, but that court dismissed the appeal on the ground that the order appealed from did not finally determine the proceeding within the meaning of the New York Constitution (23 N Y 2d 1011, Juris. Statement, Exh. D, p. 22). The order entered on such motion is the one appellant now seeks to have this Court review.

ARGUMENT

The order of the New York Court of Appeals appealed from is not reviewable because it was based on an adequate, independent non-federal ground.

As appears from the memorandum opinion of the New York Court of Appeals (23 N Y 2d 1011, Juris. Statement, Exh. D, p. 22), the decision sought to be reviewed here was based on the New York procedural rule that the New York Court of Appeals will not review an order which does not finally determine the proceeding within the meaning of the New York Constitution. It is therefore clear that the decision was put upon an adequate, independent non-federal ground which was broad enough to sustain the order.

This Court will not review a judgment of a state court which is put upon a non-federal ground, independent of the federal question involved and broad enough to sustain the judgment. See *McCoy* v. *Shaw,* 277 U. S. 302 (1928); *Nickel* v. *Cole,* 256 U. S. 22 (1920); *Fox Film Corp.* v. *Mueller,* 296 U. S. 207 (1935); STERN & GRESSMAN, *Supreme Court Practice* (3d Ed. 1962), pp. 105-106, 110-112; 36 C.J.S., *Federal Courts,* §244, pp. 715-719.

In the case at bar the non-federal ground upon which the New York Court of Appeals rested its decision was based on its earlier decision in *Eagle* v. *Cherney,* 290 N. Y. 741, 49 N. E. 2d 1008 (1943), in which the Court of Appeals dismissed a motion for leave to appeal from an order of the Appellate Division, which, like the order here, denied the plaintiff's motion for an order reinstating an appeal to that court which had previously been dismissed for failure to perfect, on the ground that the order did not finally determine the action within the meaning of the New York Constitution.

Other cases in which the Court of Appeals dismissed appeals or denied motions for leave to appeal from somewhat similar orders for lack of finality include: *Hayes* v. *Utica Mut. Ins. Co.,* 20 N Y 2d 938 (1967) (appeal from order denying appellant's motion to further extend time within which to perfect appeal); *Onna* v. *Aim Estates, Inc.,* 20 N Y 2d 955 (1967) (appeal from order dismissing appeal for failure to prosecute); *Benaryeh, Inc.* v. *Hartford Fire Ins. Co.,* 19 N Y 2d 670, 225 N. E. 2d 552 (1967) (appeal from order denying motion to reargue motion to dismiss appeal); *Body* v. *Roosevelt Raceway,* 17 N Y 2d 505 (1966) (appeal from order dismissing appeal for failure to prosecute); *Schildhaus* v. *City of New York,* 16 N Y 2d 833 (1965) (appeal from order

denying motion to vacate prior order conditionally granting motion to dismiss cross appeal for failure to perfect).

As the Court of Appeals indicated in its opinion in the condemnation proceeding, the rights of the parties were finally determined by the 1957 order of the New York Supreme Court denying appellant's motion for commissioners to hear his claim from which appellant did not appeal (20 N Y 2d 568, 571, 232 N. E. 2d 642, Juris. Statement, Exh. H, p. 31).

The present Article 78 proceeding was not finally determined by the order of the Appellate Division denying appellant's motion to reinstate his appeal but by appellant's failure to file and serve his papers within the time prescribed by the previous order of the Appellate Division conditionally dismissing the appeal. Cf. *Van Arsdale* v. *King*, 155 N. Y. 325, 328-329, 39 N. E. 866, 867 (1898); *Matter of Arcadu* v. *Levinson*, 250 N. Y. 355, 357, 165 N. E. 809, 810 (1929).

It is therefore clear that the dilemma appellant finds himself in is the result of his failure to pursue his remedies in the state courts in accordance with the New York rules of practice.

The Court of Appeals also frequently dismisses appeals, or denies motions for leave to appeal, from orders similar to the one involved here on the ground that the orders involve questions of discretion of the type not reviewable by that court. *Manville* v. *Bank of New York*, 22 N Y 2d 934 (1968) (appeal from order dismissing appeal for failure to prosecute, denying motion for enlargement of time within which to perfect appeal and for leave to perfect it upon partial record); *Hayes* v. *Utica Mut. Ins. Co., supra*, 20 N Y 2d 938 (1967) (appeal from order dismissing appeal for failure to perfect); *Benarych*,

Inc. v. *Hartford Fire Ins. Co.*, 19 N Y 2d 670, 225 N. E. 2d 552 (1967), *supra*, (appeal from order dismissing appeal for failure to serve and file papers); *Schildhaus* v. *City of New York*, 16 N Y 2d 833 (1965), *supra*, (appeal from order denying appellant's motion to vacate a prior order which conditionally dismissed a cross appeal for failure to perfect); *Association for Preservation of Freedom of Choice* v. *Nation Co.*, 13 N Y 2d 856, 192 N. E. 2d 273 (1963) (appeal from order and judgment dismissing appeal for failure to prosecute).

The statement of the New York Court of Appeals in the condemnation proceeding (20 N Y 2d 568, 573, 232 N. E. 2d 642, Juris. Statement, Exh. H, p. 32) to the effect that there must be an end to lawsuits and that the time to take an appeal cannot forever be extended applies with even greater force at the present stage of this litigation.

CONCLUSION

The appeal from the order of the Court of Appeals of the State of New York should be dismissed.

June 10, 1969.

Respectfully submitted,

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Corporation Counsel of the City of New York,
Attorney for Appellees.

Stanley Buchsbaum,
Theodore R. Lee,
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